Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1415

In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL FACCHIANO, JR., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY G. THORN
Acting Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
MARY-HELEN MAUTNER
Counsel for Appellate Litigation
JEFFREY A. HENNEMUTH
Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals properly affirmed the denial of petitioners' request for an injunction to prevent the Department of Labor from continuing with contract debarment proceedings against them, because petitioners have not exhausted administrative remedies by presenting their defense of res judicata in the debarment proceedings.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	19
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Babcock & Wilcox Co. v. *Marshall*, 610 F.2d 1128 (3d Cir. 1979) 4, 12

Bethlehem Steel Corp. v. *EPA*, 669 F.2d 903 (3d Cir. 1982) 7, 17

Board of Education v. *Harris*, 622 F.2d 599 (2d Cir. 1979), cert. denied, 449 U.S. 1124 (1981) 16, 17

Bowen v. *City of New York*, 476 U.S. 467 (1986) 11

Columbia Gas Transmission Corp. v. *Allied Chem. Corp.*, 652 F.2d 503 (5th Cir. 1981) 17

Continental Can Co. v. *Marshall*, 603 F.2d 590 (7th Cir. 1979) 4, 6, 15

FTC v. *Standard Oil Co.*, 449 U.S. 232 (1980) 12

Flying Tiger Line v. *Teamsters Pension Trust Fund*, 830 F.2d 1241 (3d Cir. 1987) 18

Heckler v. *Ringer*, 466 U.S. 602 (1984) 11, 15

McKart v. *United States*, 395 U.S. 185 (1969) 11, 12, 13, 16, 17

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) 4, 15

Patrick v. *Burget*, No. 86-1145 (May 16, 1988) 8

Renegotiation Board v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974) 15

St. Regis Paper Co. v. *Marshall*, 591 F.2d 612 (10th Cir.), cert. denied, 444 U.S. 828 (1979) 18

Susquehana Valley Alliance v. *Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980) 4

Cases—Continued: Page

Uniroyal, Inc. v. *Marshall*, 579 F.2d 1060 (7th Cir. 1978) 18
United States v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966) 9, 10
United States v. *Western Pacific R.R.*, 352 U.S. 59 (1956) 12
University of Tennessee v. *Elliott*, 478 U.S. 788 (1986) ... 9
W.R. Grace & Co. v. *Rubber Workers*, 461 U.S. 757 (1983) 15
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 11, 13
Youakim v. *Miller*, 425 U.S. 231 (1976) 8

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 704 (§ 10(c)) 12
Contract Work Hours and Safety Standards Act, 40 U.S.C. 327 *et seq.* 2, 3
Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (Supp. V 1987) 2, 3, 7, 9
40 U.S.C. 276a-2 ..... 7, 8
42 U.S.C. 405(g) 15
42 U.S.C. 5310 2
Reorg. Plan No. 14 of 1950, 3 C.F.R. 1007 (1949-1953 comp.) 7-8
24 C.F.R.:
Section 24.4(a) (1985) 9
Section 24.6 3
Section 24.6(a)(1) (1985) 3
Section 24.6(a)(9) (1985) 3
29 C.F.R.:
Section 5.6(b) 8
Section 5.12 8
Section 5.12(b) 8
Section 5.12(b)(1) 3
Section 6.30-6.34 8
Section 7.1(b) 8
Section 7.9 8
48 C.F.R. 9.406-1(c) 9

Miscellaneous—Continued: Page

52 Fed. Reg. 37,116 (1987) 3

53 Fed. Reg. (1988):
p. 19,161 9
p. 19,179 9

Restatement (Second) of Judgments (1982) 10

5 J. Stein, G. Mitchell & B. Mezines, *Administrative Law* (1988 & Supp. 1989) 13

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1415

MICHAEL FACCHIANO, JR., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 859 F.2d 1163. The report and recommendation of the United States Magistrate (Pet. App. 20-28) are reported at 108 Lab. Cas. (CCH) ¶ 35,071. The order of the district court adopting the magistrate's report and recommendation (App., *infra*, 1a-2a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1988, and a petition for rehearing was denied on November 22, 1988. The petition for a writ of certiorari

[1] The appendix to the petition for a writ of certiorari does not contain the district court's order in this case, and we have therefore reproduced that order as an appendix to this brief.

was filed on February 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Facchiano Construction Company is a corporation engaged in the concrete construction business. Petitioners Michael Facchiano, Jr., and John Facchiano are officers of the company. Between 1982 and 1984, the company performed a series of construction projects that were partially funded by the United States Department of Housing and Urban Development (HUD). Pet. App. 3, 20-21.

In 1984, the United States Department of Labor (DOL) conducted an investigation of the company's performance. The investigation revealed that the company had been paying its employees on the HUD projects less than the prevailing wages and overtime compensation required by the Davis-Bacon Act (40 U.S.C. 276a *et seq.* (Supp. V 1987), as made applicable by 42 U.S.C. 5310) and the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 *et seq.*), and that it had been falsely certifying the wages paid to reflect compliance with those statutes. Because the false wage certificates were sent through the mails, criminal charges were brought against Michael Facchiano, Jr., and the company for mail fraud. Both defendants pleaded guilty in February 1985, and they were required to make restitution in the amount of $126,000 to the affected employees. The court also sentenced Michael Facchiano, Jr., to six months' imprisonment, to be followed by five years' probation, and fined him and the company $2,000 each. Pet. App. 3-4, 20-21.

Shortly thereafter, HUD commenced proceedings to debar the company and Michael Facchiano, Jr., from HUD-sponsored contracts, because of their mail fraud

convictions.[2] On March 5, 1986, a HUD administrative law judge issued an order debarring the company and Michael Facchiano, Jr., from participating in any HUD-funded projects until November 15, 1986. That order was not appealed, and it became final on April 5, 1986. Pet. App. 4-5, 21.

While the HUD debarment proceedings were pending, DOL's Wage and Hour Division instituted debarment proceedings against petitioners pursuant to 29 C.F.R. 5.12(b)(1). That regulation authorizes DOL to debar contractors, based on certain violations of the Davis-Bacon Act, Contract Work Hours and Safety Standards Act, and other statutes prescribing labor standards for federal or federally assisted projects, from receiving any contract subject to those statutes for a period of up to three years. On October 2, 1986, after petitioners requested an administrative hearing, the Wage and Hour Division issued an order referring the matter to a DOL administrative law judge (ALJ). Pet. App. 5, 21.

2. In response to DOL's hearing order, petitioners filed this suit in the United States District Court for the Western District of Pennsylvania, seeking injunctive or mandamus relief preventing respondents from continuing with the DOL debarment proceedings. Petitioners contended that, under principles of res judicata, HUD's

---

[2] HUD regulations in effect at the time authorized HUD to debar contractors and grantees from participation in its programs on various grounds, including conviction of any criminal offense occurring in the performance of a public or private contract or subcontract, and conviction of mail fraud or "any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility." 24 C.F.R. 24.6(a)(1) and (9) (1985). The HUD debarment regulations have since been revised (52 Fed. Reg. 37,116 (1987)), but the foregoing grounds for debarment have been retained. See 24 C.F.R. 24.6.

debarment of the company and Michael Facchiano, Jr., from participation in HUD-sponsored programs for six months precludes debarment of petitioners by any other federal agency based on the same underlying investigation. Pet. App. 5, 22. Respondents moved for summary judgment on the ground that the action was barred by petitioners' failure to exhaust their administrative remedies, and the district court, adopting a magistrate's report and recommendation, granted the motion (App., *infra*, 1a-2a; Pet. App. 20-28).

The district court found inapplicable various grounds on which exhaustion may be excused in certain circumstances. First, the court reasoned that "[t]he injuries envisioned by the plaintiffs, litigation expenses and loss of business[,] are the normal cost of litigation" and "[have] been held not to be 'irreparable injury' " (Pet. App. 24, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938)). Second, the court held that exhaustion would not be futile, because "[petitioners] could raise any defenses, including that of res judicata and collateral estoppel[,] in an administrative hearing and on appeal" (*id.* at 24). Finally, the district court determined that exhaustion could not be excused on the ground that " 'the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights' " (*ibid.*, quoting *Susquehana Valley Alliance* v. *Three Mile Island Nuclear Reactor*, 619 F.2d 231, 245 (3d Cir. 1980)). In this regard, the district court observed that exhaustion has been excused "when the administrative procedure would subject 'a party to "vexatious and harassing" prosecution by refusing to apply collateral estoppel' " to prevent relitigation of an issue that previously had been resolved in the party's favor. Pet. App. 24-25, quoting *Babcock & Wilcox Co.* v. *Marshall*, 610 F.2d 1128, 1138 (3d Cir. 1979), and *Continental Can Co.* v. *Marshall*, 603 F.2d 590, 596 (7th Cir. 1979). Here, however, the court

found no such "vexatious and harassing" prosecution or other violation of statutory or constitutional rights. Moreover, it concluded that there was an insufficent relationship between the HUD and DOL debarment proceedings to require that DOL give claim-preclusive effect to the HUD action in the DOL debarment proceedings (Pet. App. 24-28). The court relied on two factors: (i) as required by HUD regulations, the HUD proceedings were limited to the debarment of petitioners from HUD programs, while the debarment proposed by DOL would have government-wide effect, and (ii) the HUD debarment was based on the fact of a criminal conviction of an offense that indicated lack of business integrity or that seriously affects the question of present responsibility, while the DOL action was based directly on the Davis-Bacon violations (*id.* at 28). Accordingly, the court denied petitioners' request for injunctive relief and granted the respondents' motion for summary judgment (*ibid.*).

3. A divided panel of the court of appeals affirmed the district court's judgment (Pet. App. 1-19). The majority concluded that petitioners must exhaust their administrative remedies by presenting the res judicata defense in the DOL debarment proceedings before asking for judicial relief. Because the court of appeals understood the district court's opinion to have resolved the merits of the preclusion issue, it vacated the opinion so that DOL could address that issue in the first instance (*id.* at 9, 14).

a. The court of appeals stated that the principles of finality underlying the doctrine of res judicata apply to administrative as well as judicial proceedings, and that because the HUD debarment proceedings were adjudicatory in nature, DOL "must at least consider" petitioners' preclusion defense in its debarment proceedings (Pet. App. 7-9). In light of this obligation, the court found no occasion here to dispense with the exhaustion require-

ment, and thereby to deprive DOL of the opportunity to consider petitioners' asserted defense in the first instance (*id.* at 9-14).

The court of appeals identified three circumstances in which it had declined to require exhaustion in other cases: (1) when the challenged agency action represents a "clear and unambiguous violation of statutory or constitutional rights"; (2) when resorting to administrative remedies would be clearly inadequate to prevent irreparable injury; and (3) when exhaustion would be futile (Pet. App. 9). The court found none of these exceptions applicable here. First, the court concluded that DOL's pursuit of a debarment remedy that is different in length and scope from the HUD debarment and is imposed under a different set of regulations did not, on its face, suggest an "aggravated" disregard for preclusion principles that would constitute the sort of vexatious prosecution or harassment for which exhaustion would not be required (*id.* at 11-13). That was especially so, the court reasoned, since petitioners lost in the HUD debarment proceedings, whereas in *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979), upon which petitioners principally relied, the private party was forced to relitigate an issue on which it had prevailed in prior administrative proceedings (*id.* at 13). Second, the court of appeals noted that petitioners had failed to demonstrate how they would be harmed by litigating their preclusion defense before DOL (*ibid.*); in fact, the majority thought it likely that administrative litigation "could have been more efficient and economical than [petitioners'] pursuit of an injunction" (*ibid.*). Third, finding that "there [wa]s no claim of futility," the court declined to address that possible exception to the exhaustion rule (*id.* at 10).

The court of appeals further noted that its prior decisions appeared to recognize a fourth exception to the exhaustion requirement, applicable " 'where a dispute cen-

ters on legal questions such as constitutional or statutory interpretation' " (Pet. App. 10 n.4, quoting *Bethlehem Steel Corp.* v. *EPA*, 669 F.2d 903, 907 (3d Cir. 1982)). However, it considered the issue of whether the HUD and DOL debarment claims are similar enough to warrant preclusion to be a mixed question of law and fact, rather than a "strictly legal" question (*id.* at 10 n.4). The court also deemed it appropriate to allow DOL to decide the preclusion issue in the first instance because it is most familiar with the prerequisites for debarment under the Davis-Bacon Act and other federal contract labor statutes, and therefore is most conversant with what constitutes the relevant cause of action for purposes of applying preclusion principles (*ibid.*).

b. Judge Rosenn dissented (Pet. App. 14-19). He did not dispute the majority's holding that DOL's debarment proceedings were neither vexatious nor inconsistent with the requirements of due process. Contrary to the majority, however, Judge Rosenn believed that application of the doctrine of claim preclusion presents a purely legal question requiring no factfinding and no exercise of expertise by DOL, and that resorting to administrative remedies in this case would only delay judicial resolution and pose an unnecessary hardship for petitioners (*id.* at 16-18).

ARGUMENT

The court of appeals correctly held that petitioners must exhaust available administrative remedies in pursuing their claim-preclusion defense to the Department of Labor's debarment proceedings. It is undisputed that the applicable statutes and regulations confer on DOL the responsibility to investigate and debar federal contractors who fail to maintain the requisite labor standards for their employees. See 40 U.S.C. 276a-2; Reorg. Plan No. 14 of

1950, 3 C.F.R. 1007 (1949-1953 comp.); 29 C.F.R. 5.6(b), 5.12. That responsibility includes the authority to conduct administrative hearing and review proceedings, and to rule on whatever factual and legal defenses may be raised by a particular contractor, including res judicata. See 29 C.F.R. 5.12(b), 6.30-6.34, 7.1(b), 7.9. Petitioners have attempted to circumvent DOL's authority in this case by refusing to present their preclusion defense to the ALJ and instead seeking to have the district court block the debarment proceedings altogether. The court of appeals' holding that petitioners may not disrupt orderly administrative processes in this manner does not conflict with any decision of this Court or of another court of appeals. Review by this Court therefore is not warranted.

1. Before addressing the exhaustion issue, petitioners seek to persuade the Court that their claim-preclusion defense is meritorious. See Pet. 7-11. The court of appeals declined to reach that issue, because it held that DOL should have an opportunity to consider the defense in the administrative proceedings (Pet. App. 14). There accordingly is no occasion for this Court to address the merits of the claim-preclusion defense. See *Patrick* v. *Burget*, No. 86-1145 (May 16, 1988), slip op. 4-5 n.5; *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

Petitioners' submission that DOL is required as a matter of law to dismiss its debarment proceedings on preclusion grounds does, however, warrant a brief response. Petitioners point to no statutory provision or regulation that precludes DOL from debarring a contractor on a government-wide basis, as expressly contemplated by the Davis-Bacon Act (see 40 U.S.C. 276a-2), simply because another federal agency has imposed a more limited debarment on the same contractor under separate authority and legal rationale. Petitioners instead invoke general principles of res judicata—largely drawn from precedents ap-

plicable to judicial proceedings—in seeking that extraordinary result. Although judicially fashioned preclusion principles have been applied to administrative proceedings in appropriate circumstances (see *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 419 (1966)), such principles should not be imposed by the courts in the quite different setting of administrative adjudication without a due regard for the statutory and administrative schemes at issue. Cf. *University of Tennessee* v. *Elliott*, 478 U.S. 788, 793, 795-796 (1986).[3]

The HUD regulations that were in effect at the time of the HUD debarment at issue in this case authorized it to debar a person only from participation in HUD programs. 24 C.F.R. 24.4(a) (1985).[4] The question involved in the DOL proceedings that petitioners seek to enjoin—whether petitioners should be barred from participating in *all* government contracts covered by the Davis-Bacon Act and related statutes—was beyond the jurisdiction of HUD to decide. It is indisputably within the power of Congress (and of the Executive agencies in the absence of a controlling statute) to provide for the question of debarment

---

[3] In *Utah Construction & Mining Co.*, upon which petitioners rely (Pet. 7-8), the Court noted that the contract-disputes clause and the governing statute accorded finality to administrative findings on factual issues. 384 U.S. at 419.

[4] Since the time of HUD's debarment of Michael Facchino, Jr., and the company, common rules have been adopted by HUD and other Executive Branch agencies providing that one agency's debarment of a person from nonprocurement programs will result in government-wide debarment from all such programs. 53 Fed. Reg. 19,161 (1988); see *id.* at 19,179 (HUD regulations). See also 48 C.F.R. 9.406-1(c) (federal acquisition regulation section providing for government-wide debarment from procurement contracts). These regulatory provisions indicate that the claim-preclusion issue petitioners raise may be of little continuing importance in the debarment setting.

before each Executive agency to be independently determined by that agency, rather than in a single proceeding of government-wide scope. In those circumstances, to treat the entire Executive Branch as a single entity for res judicata purposes, and thereby to preclude debarment by any other agency as a matter of law once a single agency has acted, would be inconsistent with the statutory and administrative scheme. In the present case, the HUD proceedings had only a limited scope, whereas the DOL proceedings may culminate in a debarment order applicable to all covered government contracts.

Contrary to petitioners' contention, the absolute rule of preclusion for which they argue is not required by general principles of res judicata. Even in successive judicial proceedings, a claim is not extinguished by the doctrine of claim preclusion where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action" (Restatement (Second) of Judgments § 26(c) (1982)). Nor is a subsequent judicial proceeding barred where "it is the sense of the scheme that the plaintiff should be permitted to split his claim" (*id.* § 26(d)). The same principles apply with special force in administrative proceedings, where there frequently are limitations on the jurisdiction or authority of the agency concerned. See *id.* § 83(3) ("An adjudicative determination of a claim by an administrative tribunal does not preclude relitigation in another tribunal of the same or a related claim based on the same transaction if the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim."); see also *id.* § 83 comment g; *Utah Construction & Mining Co.*, 384 U.S. at 419 n.15 ("if the findings made

by the Board are not relevant to a dispute over which it has jurisdiction, such findings would have no finality whatsoever").

For the foregoing reasons, there is no merit to petitioners' broad contention that general principles of claim preclusion would require DOL to dismiss its debarment proceedings against petitioners because of the prior HUD debarment. We do not suggest, of course, that DOL is without authority to fashion its own rules or principles that would give some preclusive effect to a prior adjudication by another agency on the same or related issues. That, however, is a matter committed to DOL, at least in the first instance, in the exercise of its statutory responsibilities and administrative expertise.

2. Putting the merits of petitioners' broad and absolute position to one side, the court of appeals correctly held that petitioners' preclusion defense should first be presented to DOL in the course of the administrative debarment proceedings.

a. As this Court has observed, "[e]xhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefits of its experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975). See also *Bowen* v. *City of New York*, 476 U.S. 467, 484 (1986); *Heckler* v. *Ringer*, 466 U.S. 602, 619 n.12 (1984); *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969). Where an agency has been granted authority to adjudicate certain matters, it is crucial to the integrity of that administrative scheme – and usually more efficient – for the agency to exercise its discretion and apply its expertise without the interruption that is necessarily occasioned by judicial review

at intermediate stages. *McKart*, 395 U.S. at 194. This practice not only preserves the agency's operational autonomy but also conserves judicial resources: since the agency may resolve the issue in favor of the complaining party or may grant that party relief on other grounds, "the courts may never have to intervene." *Id.* at 195. See also *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980) ("[j]udicial intervention into the agency process * * * leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary").[5] In addition, by waiting for a final agency decision, the reviewing court "exemplifies deference within the constitutional framework to Congress's decision as to the proper forum for the initial resolution of disputes under its statutes." *Babcock & Wilcox Co.* v. *Marshall*, 610 F.2d 1128, 1137 (3d Cir. 1979).[6]

---

[5] Indeed, the need for a final agency decision as a predicate for judicial action of the kind sought here is supported not only by the exhaustion doctrine but by the judicial review provisions of the Administrative Procedure Act (APA). Section 10(c) of the APA, as now codified at 5 U.S.C. 704, authorizes judicial review of "[a]gency action made reviewable by statute and *final* agency action for which there is no other adequate remedy in a court" (emphasis added). See *FTC* v. *Standard Oil Co.*, 449 U.S. at 238-246.

[6] Petitioners erroneously contend (Pet. 11-15) that this case involves the doctrine of primary jurisdiction, not exhaustion of administrative remedies, and that, in any event, the two doctrines are essentially indistinguishable for present purposes. There is, however, a clear difference between the two doctrines. Whereas the exhaustion doctrine serves to restrain judicial interference whenever a claim is cognizable in the first instance by an administrative agency, the primary jurisdiction doctrine applies only when a claim that is originally cognizable by the courts requires the resolution of issues that fall within the special competence of an administrative body. *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956). That difference is critical

While it is possible to discern certain general principles governing the application of the exhaustion doctrine, the Court has made clear that the doctrine "should be applied with a regard for the particular administrative scheme at issue." *Weinberger* v. *Salfi*, 422 U.S. at 765. See also *McKart* v. *United States*, 395 U.S. at 193 ("[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved"). With that basic principle in mind, the courts have often addressed the question of exhaustion on a case-by-case basis, with the results typically limited to the particular statutory and regulatory framework and factual context presented. See 5 J. Stein, G. Mitchell & B. Mezines, *Administrative Law* § 49.02 (1988 & Supp. 1989) (discussing cases). The court of appeals followed that course here.

---

here, because the question whether petitioners should be debarred—and therefore whether they have a valid defense to debarment—is committed to DOL in the first instance. The doctrine of primary jurisdiction, which focuses solely on deferring to administrative expertise on one or more issues in an existing judicial proceeding, does not address the further concerns for administrative autonomy, judicial economy, and the comprehensive administrative resolution of disputes that also underlie the exhaustion doctrine.

Petitioners nevertheless argue (Pet. 11-12 n.5) that this case involves the doctrine of primary jurisdiction because the district court in which they filed suit possessed "original" jurisdiction to review agency action and issue injunctions and writs of mandamus. They overlook the fact that the issue of claim preclusion arises here solely as a defense to a "claim"—*i.e.*, the debarment of a government contractor for violation of federally mandated labor standards—that is orginally cognizable only by DOL. Plainly, this is *not* a situation in which an issue within the competence of an administrative agency arises only in the course of an independent judicial proceeding. If petitioners' theory were adopted, it would all but eliminate the exhaustion doctrine, because district court review of agency action is often based on general grants of federal-question and mandamus jurisdiction.

b. Given the purposes underlying the exhaustion doctrine and the principles governing its application, the court of appeals had ample reason to require petitioners to litigate their preclusion defense before DOL. The question whether HUD's debarment of petitioners precludes DOL from pursuing its own debarment remedy is a matter of great significance to DOL that it should resolve in the first instance. Petitioners would refuse DOL the opportunity to determine for itself the extent to which its power and responsibility to debar petitioners from any federal contract for violation of prevailing wage and overtime requirements has been preempted by HUD's separate authority to deny them participation in HUD programs based on a criminal conviction for mail fraud. Such evasion of DOL's administrative forum, if permitted, would seriously impinge on its statutory and regulatory authority to adjudicate violations of contractor labor standards. It also might impose an unnecessary burden on the judiciary, because administrative resolution of the preclusion issue (or other issues) in the contractor's favor could eliminate the need for judicial intervention, or at least narrow its scope.

Moreover, even if DOL ultimately should reject petitioners' preclusion defense and enter a debarment order, and if petitioners then should seek judicial review of the order, a court reviewing the matter at that time would have the benefit of the expertise of DOL adjudicators in construing the pertinent statutes and regulations, as well as the agency's development of the facts relevant to the preclusion issue (*e.g.*, the identity of the parties, the nature of the cause of action, and the similarity of the facts and evidence supporting the respective debarment actions). Indeed, as the court below aptly observed (Pet. App. 10 n.4), "the body most conversant with the matter of what constitutes a debarment cause of action for DOL is DOL."

Cf. *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 764-765 (1983).

Finally, the application of the exhaustion doctrine when a party raises a preclusion claim is not a question of first impression for this Court. In *Heckler* v. *Ringer*, the Court enforced the statutory exhaustion requirement in 42 U.S.C. 405(g) despite the plaintiffs' contention that administrative adjudicators had awarded benefits under the Medicare program for a particular medical procedure and that, under principles of issue preclusion, those administrative decisions were binding upon the Secretary in ruling on the plaintiffs' claims for benefits for the same medical procedure. See 466 U.S. at 610-611, 614-615, 618-619 & n.12. There is no reason why exhaustion should be any less required under DOL's contract debarment program than it was under the Medicare program in *Ringer*.

c. Petitioners no longer insist that exhaustion should be excused on grounds of vexatious prosecution or irreparable harm,[7] but they now contend, erroneously, that

---

[7] Although the court of appeals "intimate[d] no view" on the preclusion issue, it correctly observed (Pet. App. 12) that a case "involv[ing] two different agencies pursuing two debarments differing in length and scope under two different sets of regulations" does not exhibit the sort of aggravated disregard for principles of claim preclusion that might exempt a party from the exhaustion requirement. Cf. *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979) (agency precluded from repeatedly litigating against the same employer an interpretation of OSHA noise-reduction standards that had previously been ruled invalid). The court below was likewise correct in finding that litigation of the preclusion defense before DOL would not cause petitioners irreparable harm. As this Court has observed, "[m]ere litigation expense * * * does not constitute irreparable injury." *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). See also *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938) ("[o]bviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the

they should not be required to exhaust their administrative remedies because the issue of whether the HUD debarment precludes the DOL debarment proceedings is "a 'strictly legal one,' involving neither the agency's particular expertise nor its fact-finding abilities" (Pet. 13, quoting *Board of Education* v. *Harris*, 622 F.2d 599, 607 (2d Cir. 1979), cert. denied, 449 U.S. 1124 (1981)). Even assuming that the broad exception petitioners apparently urge for all "strictly legal" issues would be consistent with the principles underlying the exhaustion doctrine,[8] the court of appeals correctly found that exception inapplicable in this case (Pet. App. 10 n.4). As we have noted, there are factual questions remaining that bear on whether the two debarment actions are identical for purposes of claim preclusion. For this reason, the court below correctly found that application of claim-preclusion principles in

---

charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage").

[8] Petitioners rely (Pet. 14-15) on *McKart* v. *United States* for the proposition that the exhaustion doctrine is inapplicable where a "strictly legal" issue is presented. However, *McKart* did not involve a premature resort to the courts by a person who was a party to an ongoing administrative proceeding, but rather a criminal prosecution in which the defendant invoked a legal defense that previously had been rejected in an agency decision that the criminal defendant had declined to appeal through the administrative process. 395 U.S. at 196-197. The Court held that the district court in the criminal prosecution could consider the defense when it was too late for the defendant to take an administrative appeal; the Court relied in part on the fact that the defense raised solely a question of statutory interpretation. *McKart* does not support petitioners' apparent view that, outside the special context of criminal prosecutions, the courts should freely entertain suits raising statutory challenges to agency action where, as here, the administrative process remains available and the party seeking relief has not exhausted that process.

this instance presents a mixed question of law and fact. This determination by the court of appeals does not warrant further review.

Moreover, as the court of appeals observed, the exception on which petitioners rely pertains only to " 'legal questions *such as constitutional or statutory interpretation*' " (Pet. App. 10 n.4 (emphasis added), quoting *Bethlehem Steel Corp.* v. *EPA*, 669 F.2d at 907).[9] Here, petitioners do not contend that any statutory provision requires dismissal of the DOL debarment proceedings on res judicata grounds. Accordingly, although any court that addresses petitioners' claim-preclusion defense will necessarily examine the statutes and regulations governing the two agencies' proceedings, the court's task will primarily involve the elaboration and application of preclusion principles that are not derived from any constitutional or statutory text. The extent and manner in which such general principles should be applied in DOL's adjudicatory proceedings must take account of DOL's understanding of and experience with those proceedings. Thus, the preclusion defense petitioners raise does not present a pure "question of law" and does not fall within the narrow exception that some courts, including the court below, have recognized in certain circumstances.

---

[9] See also *McKart*, 395 U.S. at 197-198 (failure to exhaust will be excused in subsequent criminal prosecution where, *inter alia*, issue presented is "solely one of statutory interpretation"); *Columbia Gas Transmission Corp.* v. *Allied Chem. Corp.*, 652 F.2d 503, 519-520 n.15 (5th Cir. 1981) (court will not refer matter to agency under doctrine of primary jurisdiction where question concerns application of statutory terms to specific events); *Board of Education* v. *Harris*, 622 F.2d at 606 (no reference for agency consideration under doctrine of primary jurisdiction if question is solely one "of the interpretation of the statute").

In any event, courts have often found agency review "desirable even when pure questions of law are concerned, in order to provide the court with the benefit of the agency's considered interpretation of its enabling authority." *St. Regis Paper Co.* v. *Marshall*, 591 F.2d 612, 614 (10th Cir.), cert. denied, 444 U.S. 828 (1979). See also *Uniroyal, Inc.* v. *Marshall*, 579 F.2d 1060, 1064-1066 (7th Cir. 1978) (exhaustion doctrine applies to questions of law when the agency's construction ordinarily would be entitled to judicial deference).[10] Accordingly, because the court below reasonably concluded that DOL's expertise in handling debarment cases would be helpful in determining whether the HUD debarment has preclusive effect in this instance, it properly deferred consideration of that issue pending completion of the administrative proceedings.[11]

---

[10] Compare *Flying Tiger Line* v. *Teamsters Pension Trust Fund*, 830 F.2d 1241, 1253-1255 (3d Cir. 1987), where the court held that, even though the issue was one of statutory interpretation (under the Multiemployer Pension Plan Amendments Act of 1980), it was appropriate to require the parties to exhaust the administrative remedy of arbitration before seeking judicial review.

[11] Because the court of appeals did not address the issue (Pet. App. 10), this Court is not obligated to consider petitioners' further contention (Pet. 16-17) that they should not be required to exhaust their administrative remedies because DOL has exhibited "hostility and manifest opposition to" their claim-preclusion argument. See page 8, *supra*. Petitioners' argument, moreover, is groundless: there is nothing in the record to demonstrate that DOL's adjudicators have prejudged the preclusion defense or that they would deny petitioners a full and fair hearing on that defense if the matter were presented in the debarment proceedings. To the extent petitioners' suggestion of "hostility" is based on the fact that respondents took a position in these judicial proceedings on petitioners' broad and absolute argument that DOL is required as a matter of law to dismiss its debarment proceedings, that rationale for avoiding the exhaustion requirement is pure bootstrap. If adopted by this Court, it would unjustly reward a party for attempting an unwarranted circumvention of the ad-

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JERRY G. THORN
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

JEFFREY A. HENNEMUTH
Attorney
Department of Labor

MAY 1989

---

ministrative process and effectively forcing the agency to take a position on certain legal issues in judicial proceedings that were without merit to begin with.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 86-2711

MICHAEL FACCHIANO, JR., ET AL., PLAINTIFFS

v.

THE UNITED STATES DEPARTMENT OF LABOR, ET AL.,
DEFENDANTS

[Feb. 16, 1988]

ORDER

AND NOW, this 16th day of February, 1988, after the plaintiffs, Michael Facchiano, Jr. et al., filed an action in the above-captioned case, and after the defendants filed a motion to dismiss for lack of jurisdiction and cross motions for summary judgment were also filed, and after the Report and Recommendation was filed by the United States Magistrate, and the parties were granted ten days in which to file objections thereto, and after the plaintiffs filed objections, and the defendants filed a response to the plaintiffs' objections, and upon independent review of the pleadings, and the Magistrate's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the defendants' motion to dismiss is denied and the defendants' motion for summary judgment is granted.

/s/ ALAN N. BLOCH
United States District Judge

Hon. ROBERT C. MITCHELL
United States Magistrate

U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00254